Supreme Court, U.S.
FILED

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CASE NO: _____

UNITED STATES SUPREME COURT

Term beginning October 1994

VIOLA JERREL,

Petitioner,

vs.

STATE OF ALASKA,
CHARLES E. COLE,
ATTORNEY GENERAL OF THE
STATE OF ALASKA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

Hugh W. Fleischer
Counsel of Record for Petitioner
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29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Ninth Circuit erred in denying the application for a certificate of probable cause.

2. Whether the United States District Court for the District of Alaska, H. Russell Holland, United States District Court Judge, erred in denying the certificate for probable cause for appeal.

3. Whether the State of Alaska deprived the petitioner her due process rights under the 14th Amendment to the United States Constitution as well as her right to confrontation under the 6th Amendment to the United States Constitution by allowing the playback of a tape which was critical evidence in the matter to the jury without providing for the presence of petitioner, then defendant.

4. Whether the State denied petitioner her rights under the 6th Amendment to the United States Constitution by failing to

appoint independent counsel to advise petitioner on the issue of whether a conflict of interest reasonably existed between her and the public defender agency attorney as well as a failure to appoint such independent counsel.

5. Whether the State deprived the petitioner's due process rights under the 14th Amendment to the United States Constitution in the length of sentence given to the petitioner.

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REFERENCE TO THE OFFICIAL OPINIONS
DELIVERED IN THE CASE BY OTHER COURTS

United States Court of Appeals for the Ninth Circuit Decision dated May 31, 1994

United States District Court for the District of Alaska Order dated May 2, 1994

United States District Court for the District of Alaska Report and Recommendation by United States Magistrate Judge dated March 10, 1994

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. The date of entry of the judgment sought to be reviewed by the United States Court of Appeals for the Ninth Circuit was May 31, 1994. The statutory provision which confers on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES INVOLVED IN THE CASE

Article 3, Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;[9]-between Citizens of different States,-between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

14th Amendment to the United States Constitution, Section 1: All persons born or

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[9]This clause has been affected by amendment XI.

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6th Amendment to the United States Constitution: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S.C. 28 §1254 ¶ 1: Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

Petitioner was convicted of two counts of perjury under law of the State of Alaska and sentenced to consecutive terms totalling three years with two of those being suspended. That conviction occurred in 1988. Petitioner's convictions and sentence were confirmed on appeal to the Alaska Court of Appeals, Jerrel v. State, 851 P.2d 1365 (Alaska App. 1993). The below stated issues were appealed to the Supreme Court for the State of Alaska which appeals were denied by that court and which were the basis for petitioner's petition for habeas corpus filed with the United States District Court for the District of Alaska. The U.S. District Court denied an application for a Certificate of Probable Cause. The Court of Appeals also denied such Certificate, a prerequisite to the prosecution of the habeas corpus petition. The issues which were the basis for the habeas corpus petition are:

1. Whether the State Court erred in allowing the playback of a testimonial tape which was critical evidence in the matter to the jury without providing for the presence of the petitioner, then the accused, Viola Jerrel;

2. Whether the State Court erred in failing to appoint "conflict" counsel to advise petitioner on the issue of whether a conflict of interest reasonably existed between her and the public defender agency attorney as well as the failure to appoint such independent counsel.

3. Whether the State Court erred in handing down an excessive sentence to wit: three years with two years suspended.

As to the above-stated issues, the issue in regard to the State Court allowing the playback of an evidentiary tape without providing for the presence of the appellant was raised initially before the State of Alaska Court of Appeal in the appeal from the judgment. Jerrel v. State, 851 P.2d 1365, 1371-1372 (Alaska App. 1993).

The issue regarding the failure to appoint "conflict" counsel was raised by the petitioner at the trial. Jerrel v. State, supra at 1372-1373.

The issue as to the alleged excessiveness of sentence was raised on appeal to the State of Alaska Court of Appeals. Jerrel v. State, supra at 1373-1374.

Petitioner sought a review of the denial of her habeas corpus ultimately to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure.

ARGUMENT

During the trial of the subject case below, State of Alaska v. Jerrel, Case No: 3KN-S87-1037, the jury requested certain evidence to be replayed on the tape that is used as the official record of the State Superior Court. The court authorized the playing of those exhibits. There was no indication that

the defendant was present. The accused has the legal right to be present at all stages of trial. Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). Such right on the part of the accused is based on either the Confrontation Clause of the Sixth Amendment to the United States Constitution or the Fourteenth Amendments Due Process Clause. Illinois v. Allen, 397 U.S. 337, 9 S.Ct. 1057, 25 L.Ed. 2d 353 (1970); Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884).

As to the second issue of failing to appoint "Conflict Counsel" the petitioner asked the trial judge during the trial for the court to appoint independent counsel to advise her on her conflict interest issue. The court declined to do so. Petitioner had a right to counsel under the Sixth Amendment which was made enforceable against the State in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 799 (1953). Petitioner was entitled to such

competent independent counsel. In Moore v. United States, 432 F.2d 730 (3d Cir. 1970), the court set out the test for adequacy of counsel ". . . for whether an indigent is represented by an individual or by an institution, he is entitled to legal services of the same level of competency as that generally afforded at the bar to fee paying clients."

As to the third issue which is the length of sentence, the Petitioner was sentenced by the Superior Court of the State of Alaska, Third Judicial District, on two counts of perjury for a term totalling three years and suspended two of those years. Petitioner believes the sentence to be excessive and in violation of her due process rights under the Fourteenth Amendment to the United States Constitution. Neimann v. Parratt, 596 F.2d 316 (8th Cir. 1979); Holmes v. Israel, 453 F.Sup. 864 (D. Wis. 1978) aff. 618 F.2d 111. Although the sentence was within the range of authorization under state law, both counts on which she was sentenced arose from the exact same statement by the petitioner, petitioner

had never before been charged with any crime. Moreover, Petitioner is a senior citizen whose date of birth is 7/23/32 and a former school teacher who is in ill health.

Based on the above, petitioner seeks entry of the writ for certiorari.

DATED at Anchorage, Alaska, this 26th day of August, 1994.

HEDLAND, FLEISCHER, FRIEDMAN
BRENNAN & COOKE
Attorneys for Petitioner

By: _____
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(907) 279-5528

APPENDIX

Jerrel v. State of Alaska, U.S. Court of Appeals for the Ninth Cir., Order dated May 31, 1994

Jerrel v. State of Alaska, U.S. District Court of Alaska, Order dated May 2, 1994

Jerrel v. State of Alaska, U.S. District Court of Alaska, Report and Recommendation dated March 10, 1994

Jerrel v. State of Alaska, Supreme Court of Alaska, Order dated July 22, 1993.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIOLA JERREL,	)No. 94-35449
	)
Petitioner-Appellant,	)DC# CV-93-00506
	) (HRH)
vs.	)Alaska (Anchorage)
	)
STATE OF ALASKA,	)ORDER
CHARLES E. COE,	)
Attorney General of the	)
State of Alaska,	)
	)
Respondents-Appellees.	)
	)

Before: HUG and FERNANDEZ, Circuit Judges

The application for a certificate of probable cause is denied.

cc: Fleischer
Scukanec (AAG-308)

MoCal 5/24/94/md
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

VIOLA JERREL, Petitioner, vs. STATE OF ALASKA, CHARLES E. COLE, ATTORNEY GENERAL, Respondent.	No. A93-0506-CIV (HRH) O R D E R (Certification Denied)

Plaintiff seeks certification of probable cause for an appeal in this habeas corpus proceeding as provided for by 28 U.S.C. § 2255.

Having reexamined this matter, the court is unpersuaded that there is any probable cause for an appeal in this case and declines to grant certification.

DATED at Anchorage, Alaska, this 2 day of May, 1994.

cc: Fleischer
Scukanec (AAG-308)
9CC

/S/ H. RUSSEL HOLLAND
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

VIOLA JERREL, Petitioner, vs. STATE OF ALASKA, CHARLES E. COLE, ATTORNEY GENERAL, Respondent.	))No. A93-506 Civil(HRH)))))REPORT AND RECOMMENDATION))))(PETITION FOR HABEAS) CORPUS)

The court has now before it Viola Jerrel's amended petition for habeas corpus and brief in support thereof. (Docket Nos. 25 and 27). The state has filed a responsive brief. (Docket No. 29; See also lodging of partial transcript at docket No. 28).

FACTS

Jerrel was tried by jury and convicted of two counts of perjury and sentenced to three years in prison with two years suspended. Under A.S. 11.56.200(c) perjury is punishable by a maximum term of ten years. That conviction was affirmed by the Alaska Court of Appeals. See Jerrel v. State, 851 P.2d 1365 (Alaska App. 1993). The Alaska Supreme Court denied Jerrel's petition for hearing.

The basis of the perjury charges against Jerrel sprung from a criminal complaint she filed under oath charging a police officer with assault for threatening her and her son while he escorted them from a courthouse, and subsequent testimony at a probable cause hearing. The complaint and testimony alleged that Homer Judicial Services Officer Walter Williams verbally threatened Jerrel and her son, namely, Dan Jerrel. At the time her son was on in the custody and charged with vandalism. Part of the evidence against Jerrel at trial consisted of tape recordings made by Officer Walters. Unbeknownst to Jerrel the tapes

recorded the entire encounter between Jerrel and Officer Walters.

After her case was submitted to the jury, Jerrel's lawyer expressly waived her right to be present during playbacks of testimony the jury might request during its deliberations. However, the trial judge expressly stated that he would require Jerrel to be present if the jury asked to listen to the tape recordings made by Officer Walters of his conversation with Jerrel. During its deliberations the jury asked to listen to Walter's recordings. The record reflects that Jerrel's counsel was present, but does not reflect whether Jerrel was present when the exhibits were played. On appeal Jerrel argued that the trial court erred when it allowed the jury to hear evidence in her absence.

At her trial Jerrel was represented by privately retained counsel. Her trial counsel was allowed to withdraw at the end of the trial. She was represented by the state Public Defender Agency (PDA) at sentencing. The appointment of the PDA was made over Jerrel's objections.

Specifically, she claimed that a conflict of interest existed which precluded both the PDA Agency, and the Office of Public Advocacy (OPA), which usually takes cases where a conflict exists for the public defender. These agencies had represented her sons in separate criminal matters, including the vandalism charge against Dan Jerrel. Thus, Jerrel argued, she should have private counsel appointed. In this regard Jerrel requested independent counsel to represent her on the conflict of interest issue. The PDA informed the court that it did not have a conflict in representing Jerrel. Jerrel's requests for private counsel were denied.

DISCUSSION

I

JERREL'S ALLEGED ABSENCE DURING THE PLAYING OF THE TAPES

Absent her consent or misconduct a defendant's Sixth Amendment right to confrontation entitles the defendant to be present during trial. Illinois v. Allen 397 U.S. 337, 342-343 (1970). In the instant case, Jerrel's right to be present during the trial

was intact. Specifically, while her counsel waived her presence during the replaying of testimony, the trial judge ordered that she be present if the jury listened to the tape recordings made by Officer Walters. The trial record is silent on the question of whether or not she was actually present when the recordings were played. There were no post trial motions made in this regard. Jerrel maintains the silent record is sufficient either to establish her absence or warrant setting aside the conviction. The Alaska Court of Appeals arrived at the correct conclusion when it held that "the silence of the record operates to defeat Jerrel's claim of absence, not to establish it." Jerrel v. State 851 P.2d 1365, 1372 (Alaska App. 1993). As respondent points out, going back to territorial days Alaska decisional law squarely holds that absent a contrary showing, the trial court is presumed to have acted in accordance with its ruling. Id.; United States v. Manthei's Bondsmen, 2 Alaska 459, 465 (1905). This rule is well rooted in federal law as well. Slicer et al. v. The Bank of Pittsburgh, 57 U.S.

571, 578-579 (1853). Therefore, there being no evidence to the contrary, the court presumes that Jerrel was indeed present during the playing of exhibits 5 and 8. Thus, Jerrel is not entitled to habeas relief based on her alleged absence during the playing of the Walters tapes.

II

THE FAILURE TO APPOINT CONFLICT COUNSEL

Jerrel contends that she is entitled to relief because the trial court failed to appoint counsel to look into her allegation that the PDA and OPA had a conflict of interest in representing her. This issue is readily dispensed with. The court of appeals was right on target in holding that apart "from establishing Jerrel's obstinate resolve to avoid cooperating with counsel from either the PDA or the OPA, Jerrel's allegations of conflict revealed nothing more than her vague dissatisfaction with the level of representation she believed those agencies had provided her sons in other matters." Jerrel v. State, 851 P.2d 1365, 1372 (Alaska 1993). Jerrel's

arguments that her "extreme objection" to being represented by the PDA denied her effective assistance of counsel at her sentencing are without basis in either fact or law. The due process clause the federal constitution does not guarantee a meaningful relationship between a client and her appointed counsel. Morris v. Slappy, 461 U.S. 1, 13-14 (1983). Jerrel has not demonstrated that an actual conflict existed. No claim of ineffective assistance of counsel is before this court, although the Alaska Court of Appeals did address that issue. The trial court did not abuse its discretion in appointing conflict counsel. Thus, the denial of conflict counsel is not a basis for habeas relief.

III

JERREL'S SENTENCE

Jerrel claims that her sentence for two counts of perjury was excessive. Jerrel was sentenced to three years with one year suspended (one year to serve). A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held "in custody in violation of the

Constitution or laws or treaties of the United States." Engle v. Issac, 456 U.S. 107, 119 (1982).

Jerrel argues that such a violation occurred because the two counts of perjury "arose from the exact same statement by the defendant, [and] the record is replete of their being any showing of any harm having come to the person against whom such statement was made combined with the fact that petitioner has never before been charged with an infraction of the law and is a senior citizen." Thus she argues, her Eighth Amendment right against cruel and unusual punishment has been violated.

This argument is simply without merit. Jerrel was convicted of two counts of perjury and was sentenced to one and one half years on each count with two years suspended. Each act of perjury was a separate violation of state law. One year of actual confinement for two counts of perjury cannot be described as cruel and unusual. The fact that Jerrel is a senior citizen does not render the actual sentence cruel or unusual punishment.

Finally, Jerrel attempts to weave allegedly poor health care while in prison into her Eighth Amendment argument. Jerrel misperceives the function of habeas corpus when she offers to introduce evidence that she is not receiving proper medical care at the prison facility. Conditions of prison cannot be challenged in a petition for habeas corpus. Habeas corpus tests the legality of restraint. This claim has not been exhausted in state court. Alaska decisional law specifically provides that a prison inmate seeking medical care should institute an independent civil action seeking treatment for her condition. Rust v. State, 584 P.2d 38, 39 (1978). Jerrel has made absolutely no showing that she has previously exhausted this claim. Thus, in this regard the petition should be denied for bringing an unexhausted claim.

CONCLUSION

For the foregoing reasons it is hereby recommended that the petition for habeas corpus be denied on its merits.

.....

DATED at Anchorage, Alaska, this 10th day of March, 1994.

/S/ JOHN D. ROBERTS
United States Magistrate Judge

cc: H. Fleischer
AAG 308
Judge Holland

Pursuant to Local Magistrate Rule 12(c), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of U.S. District Court no later than the close of business on March 21, 1994. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied 450 U.S. 996 (1981). Response(s) to the objections shall be filed no later than the close of business March 31, 1994. The parties shall otherwise comply with provisions of Local Rule 12(c).

Reports and Recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be

filed until entry of the District Court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

APPELLATE COURTS CLERK
303 K STREET
ANCHORAGE AK 99501

Case Title: JERREL V. STATE
Supreme Court Case #: S5742

***** O R D E R ***** 07/22/93

IT IS ORDERED: THE PETITION FOR HEARING FILED ON JULY 1, 1993, IS DENIED. ENTERED AT THE DIRECTION OF THE SUPREME COURT ON JULY 22, 1993. CC: JUSTICES, COA JUDGES (A-2740), C/S, JUDGES HANSON & CRANSTON, APPEALS DIVISION 3KN-S87-1037 CR

TRW

Clerk of The Appellate Courts

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